No. 1167

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

C. W. CORSAR et al., owners of ship "Musselcrag",

Appellants,

vs.

J. D. SPRECKELS & BROS. CO.,

Appellees.

REPLY BRIEF ON BEHALF OF APPELLANTS.

PAGE, MCCUTCHEN & KNIGHT,
Proctors for Appellants.

Pernau Press.

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REPLY BRIEF ON BEHALF OF APPELLANTS.

On behalf of the "Musselcrag", we ask the Court to note the fact that the decision of the Circuit Court of Appeals in the case of "The Germanic" quoted from on page 18 of our brief has recently been affirmed by the Supreme Court, which Court has emphasized the correctness of the rule for which we have contended.

In that case, the ship had reached a wharf at her journey's end. She was being discharged. Fault of those discharging caused the ship to lose her equilibrium and topple over and cargo was injured. The Supreme Court held that the fault lay in the failure to do an act with care which primarily was connected with, or affected the cargo, though incidentally it affected the management of the ship. It was held that the ship was liable for its failure in the care of the cargo.

The Court said:

> "If the primary purpose is to affect *the ballast of the ship,* the change is *management of the vessel,* but if, as in view of the findings we must take to have been the case here, the primary purpose is *to get the cargo ashore,* the fact that it also affects the trim of the vessel, does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections and if this be true, the question which section is to govern must be determined *by the primary nature and object of the acts which cause the loss.*"
>
> * * * "That 'in' which, as the statute puts it, the fault was shown, was not management of the vessel, but unloading cargo; and although it was fault only by reason of its secondary bearing, the primary object determines the class to which it belongs."
>
> *The Germanic,* 196 U. S. 597, 598.

This case clearly explains the case of *Knott v. Botany Mills,* 179 U. S. 69, already referred to, in which the acts of stowing the cargo and changing stow-

age were held to be primarily acts in the care and custody of the cargo, although in their "secondary " bearing" they affected the ship's trim.

Under these authorities, the right or wrong sailing of the ship, which constitute primarily her management and navigation, fall within the section of exemption provided in such cases and not within the clause creating a liability in cases affecting the care of the cargo. We have nowhere, in our argument, as clearly illustrated the nature of the fault charged against the "Musselcrag", or, by illustration, brought her case as positively within the exemption of the act, as has been done by the learned counsel against us. Referring to the crucial feature of the case, the failure of the "Musselcrag" to turn back to a port of repair where she could have been restored and made efficient to better care for her cargo, counsel says, on page 44 of his brief:

> "It is not the case where the master failed to make use of the appliances furnished by the owner, but it is the failure of the master after his vessel had become unseaworthy, *to do those things which it was incumbent upon the owner to do to render her seaworthy.*"

We ask the Court to note that counsel has well defined the fault (alleged, but not admitted or proved) as the failure to *proceed to a port of refuge and to repair his ship.* He does not *mention cargo.* It was not necessary that he should. The fault, as he charges it, was in the omission to turn back on the voyage, so that the ship might be repaired. To do

those things which "it was incumbent on the owner " to do to render her seaworthy" was to do something which was necessary *in her management.* To do that which was required to get her to the place where such things could be attended to, was to do something *in the navigation.*

Both acts could be done, would be done without a thought upon the cargo, which might or might not be aboard at the time. If both things should be done, the effect, *but in its secondary bearing only,* would possibly react upon the cargo. Their primary object and effect must affect the ship herself. It gives no room for escape from the inevitable conclusion to be reached from the decisions, to argue that because the common law required a master to seek a port of refuge to make repair,

> "the act thus required of him was, *therefore,* an act which *should* have been done primarily, if not entirely, for the protection of the cargo, and not at all for the safety of the ship."

In other words it is claimed that the master *should* have turned back, if he had had a prudent regard for the cargo. What he should *have thought of* at any given crisis, how he should have weighed his responsibility, is not the test furnished by the Harter Act to determine liability. We can consider only what he did. If the act done be complained of, as in this case, viz: that he steered his ship to the East, instead of turning back, or that he continued his voyage rather than seek a port of refuge, then the legal inquiry is: "Was " the turning Eastward, or was the continuing of the

"voyage primarily *an act of management or naviga-*
"*tion* of the ship?"

The other inquiry is "Was the act done, one which "pertained to the care of the cargo primarily?"

In the case at bar, there would seem to be no doubt, that the custody, care, or safety of the cargo was only remotely connected with the act done by the master in deviating in order to pursue his voyage. This act, as the Supreme Court says, had only a "secondary bearing" on the cargo.

Allusion is made in argument to the *Iroquois* case, in which it was held that a ship was liable for failing to put into port in aid of an injured seaman. As the Harter Act does not apply to the relation between shipowner and crew, or passengers, there is no possible analogy in principle between that case and this.

As to the several cases quoted from or cited against us which deal with the common law liability of a shipowner to take all necessary means for the protection of his cargo on the voyage, whether sea perils intervene or not, and when prudence requires it, to seek a port of refuge, we have no reason to combat their correctness. We say, simply, that they do not apply at this day when the rule of the Harter Act has relieved the common carrier from his character of insurer against the master's negligence in the management or navigation of the ship. If the old rule were now of any avail, every one of the cases, in this country and in England, which we have cited in our

opening brief, all of which relieve the carrier from such responsibility, would have held him to it. At common law, the liability of the ship, in each case, is self-evident. Yet the Courts, in each case, applied the Harter Act and exempted the ship and owner from the claims made.

THE QUESTION OF SEAWORTHINESS.

Criticism is made by counsel of the rule laid down by the lower Court regarding what proper stowage is. We take it that the warranty of good stowage is one thing; what constitutes good stowage is another thing. It is undoubtedly implied in a contract of carriage that the ship shall be fit, but what constitutes fitness depends on a well known rule:

> "The duty to supply a seaworthy ship is not equivalent to a duty to provide one that is perfect and such as cannot break down except under extraordinary peril. What is meant is that she must have that degree of fitness which *an ordinary careful and prudent owner* would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. To that extent the shipowner, as we have seen, undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed, the question to be put is, Would a prudent shipowner have required that it should be made good before sending his ship to sea, had he known of it? If he would, the ship was not seaworthy."
>
> *Carver, Carriage by Sea,* Sec. 18.

The Civil Code of California defines seaworthiness as the reasonable fitness of a vessel to perform her intended

voyage. Sec. 2682. In the same Code, it is declared that the ship impliedly warrants this reasonable fitness. *Sec. 2681.*

See *Erle, J.,* in *Small v. Gibson,* 4 H. L. Cases 384.

A fortiori is the rule applicable to a ship's stowage which often is done at a foreign port, often without previous experience by a ship-master of a particular class of goods, or of the effect of such goods upon a particular build of ship. The Court below did not deny the existence of the warranty; it merely defined what good and sufficient stowage is, viz: stowage based upon reasonable care, skill and judgment,—the ship, the goods, the voyage all being considered. A seaworthy ship is, in law, one which has been constructed with reasonable care, skill and judgment out of materials reasonably fit for the purpose. She is not bound to be the best ship in the world of her class, or even equal to the best.

The definition of the lower Court was absolutely correct when it said that good stowage is stowage made with reasonable care, skill and judgment. The ship warrants that it will furnish such stowage, no more. Such stowage, however, is very different from stowage in which the shipowner pleads as an excuse for his ship's instability that he, or his master,

> "used all such care and diligence as could *reasonably have been expected.*"
>
> *Sumner v. Caswell,* 20 F. R. 249.

The same may be said of the case set out in *The Whitlieburn,* 89 F. R. 526 where bad judgment was exercised in loading a new ship with a light cargo and insufficient ballast. Indeed, in all the cases relied upon by counsel, there was a finding of insufficiency, in the method of stowage. Reasonable skill, care or judgment had not been used. Hence the warranty was deemed to be broken. Judge de Haven simply found *as a fact,* that the "Musselcrag" was not badly stowed, as was charged. There had been no display of bad judgment, of want of care or skill in the loading. Therefore, there was no breach of the warranty.

Thought will, we submit, justify our criticism of counsel's argument when we say that he has read Judge de Haven's opinion to say that the master's best efforts and judgment, though faulty, or his best use of the facilities at hand, if these be insufficient, nevertheless, constitute good stowage. The opinion, certainly, says nothing of the kind. The learned judge correctly defines the obligation of the shipowner or master to exercise reasonable skill, judgment and care; not what is reasonable considering his personal limitations or experience, or the opportunities surrounding him, but what is reasonable in the judgment of men generally who are known to exercise skill, judgment and care. This is the warranty. It can be nothing else, unless perfection be demanded in the attainments of all men engaged in seafaring.

We cannot enter into a further analysis of the evidence in the case. Our opponent finds *here and there*

an expression upon which he bases opposition to our contention, abundantly established, that this ship had a difficult cargo to carry, one that would cause her to strain and roll, by reason of its inelasticity, whether the weather be bad or fairly good; that she was well stowed; that she rode the sea without trouble, or harm to herself, until she struck the region where she met the gales which disabled her and her crew. Thus much stress is laid on the fact that a little putty broke out on the poop, a part of the ship which has no connection with the ship's hold and which is attended to only as a matter of comfort to those who live in the cabin. Again, a few "weeps" in a part of the deck, tears that drop now and again, are magnified into evidence of open seams; the caulking by the carpenter on the main deck on a single occasion during some part of one day seems worthy of large type, though no voyage, good or bad, is unaccompanied by work of that class. The very care which the master bestowed on his decks that cargo might not be injured, seems to be ground for charging unseaworthiness of the ship. We rest upon the log as a complete history. It is amply corroborated by the master and crew.

Respectfully submitted,

PAGE, MCCUTCHEN & KNIGHT,

Proctors for Appellants.